

**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF  
ALABAMA, SOUTHERN DIVISION**

KELLEY FOODS OF ALABAMA, INC., )  
v. )  
Plaintiff, )  
v. )  
MYERS NISSI & COMPANY, INC.; a ) CIVIL ACTION NO. 1:04 - cv-01246-  
corporation d/b/a VERTICALSOFT, ) MHT-DRB  
Defendant. )

**PLAINTIFF KELLEY FOODS' COMBINED RESPONSE TO DEFENDANT'S  
MOTIONS IN LIMINE AND OBJECTION TO DOCUMENTS**

**COMES NOW** Plaintiff Kelley Foods of Alabama, Inc. ("Kelley Foods") and files this Combined Response to Defendant Myers Nissi & Company, Inc.'s ("Defendant" or "Myers Nissi") Motions in Limine and Objection to Documents. In support thereof, Kelley Foods states as follows:

Defendant has filed the following motions in limine and objections to documents:

1. Motion in Limine to Strike Declarations of Cross and Kelley;
2. Motion in Limine to Prohibit Plaintiff from Introducing Any Evidence or Testimony Regarding Alleged Damages for the Purchase of Computer Hardware;
3. Motion in Limine to Prohibit Plaintiff from Introducing Any Evidence or Testimony Regarding Alleged Implied Warranties Including Warranties of Merchantability or Fitness for a Particular Purpose;
4. Motion in Limine to Prohibit Plaintiff from Introducing Any Testimony Regarding the Proper Functioning of, or Alleged Flaws or Deficiencies in, Navision Foundation Software and/or Process 800 Software; and
5. Objections to Documents Proffered for Introduction by Plaintiffs.

Two days prior to the deadline for Kelley Foods' responses to these motions, attorney Mark Vaughan, who is Kelley Foods' long-time counsel, suffered a heart attack, and Kelley Foods filed an unopposed motion to continue the case.

After communication with the Court, Kelley Foods understands the motion will be granted, and the trial likely continued to the Court's February 26, 2007 trial term. Kelley Foods also understands that the Court will enter a formal Order resetting the deadlines for the parties to submit witness and exhibit lists, and for the filing of motions in limine, and responses to such motions and objections, and that the currently pending deadlines in the case may be considered continued. The new deadlines may also affect, or even render moot, some of the issues in the now-pending motions and objections. Therefore, Kelley Foods' understanding is that it is not required to file further substantive responses to the previously filed motions and objections at this time. However, if the Court would like to proceed with briefing on these issues despite the continuance, Kelley Foods would be pleased to provide substantive briefs addressed to the pending motions.

Respectfully submitted,

s/Howard P. Walthall, Jr.  
Howard P. Walthall (WALTF1113)  
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Attorney for Plaintiff  
Kelley Foods of Alabama, Inc.

**OF COUNSEL:**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of September, 2006, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all properly registered parties and to the extent they are not properly registered with the Court's ECF system, they have been served by directing same to their office addresses via first-class, United States mail, postage prepaid:

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s/Howard P. Walthall, Jr.  
OF COUNSEL